STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
H.W. Saad, H.R. Gage, and J.R. Cooper

In the Matter of K.H., K.L., K.L., and K.J.

Minors.

/

Supreme Court No. 122666
Court of Appeals No. 244028
Circuit Court No. 98-613188-NA

FAMILY INDEPENDENCE AGENCY,
Petitioner-Appellee,

v

TINA JEFFERSON, RICHARD JEFFERSON,
FREDERICK HERRON AND LARRY LAGRONE,
Respondent-Appellants.

/

AMICUS CURAE BRIEF FOR

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Dated: November 6, 2003

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I. **Does a putative father have standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father?**

Attorney General answers: No.

II. **In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children?**

Attorney General answers: None.

III. **Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act?**

Attorney General answers: No.

IV. **Given that MCR 3.921(C)(2)(b) [formerly, MCR 5.921(D)(2)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act?**

Attorney General answers: MCR 3.921 does not authorize the judge to enter a finding that the putative father is the legal father.

V. **Does *In re CAW* apply to this case?**

Attorney General answers: Yes.

STATEMENT OF RELEVANT FACTS

On or about April 25, 2002, Oakland County Circuit Court authorized a petition that sought the termination of parental rights as to the children Kiara Herron (born August 27, 1994), Keangelo LaGrone (born January 19, 1998), Kemaria LaGrone (born January 21, 1999) and Kejuan Jefferson (born April 6, 2000), and The petition named the mother of the children as Tina Jefferson. The petition named Mrs. Jefferson's husband, Richard Allen Jefferson, as the legal father of all of the children. The petition also listed putative fathers for the children. The putative father of Kiara was listed as Frederick Herron. The putative father of Kemaria, Keangelo, and Kejuan was listed as Larry LaGrone.

On May 8, 2002, a pretrial on the petition was conducted in front of Juvenile Court Referee Twila Leigh. Referee Leigh indicated that the petition only sought the termination of Mr. and Mrs. Jefferson's parental rights (T 5/8/02 p 4). The assistant prosecuting attorney indicated that he intended to move to amend the petition to seek termination of all of the "fathers'" rights, both legal and putative (T 5/8/02 p 4). Referee Leigh indicated that a child has only one father and that the requested relief could only be sought against one man (T 5/8/02 p 5). Furthermore, Referee Leigh indicated that if there was a legal father, then that was the end of the inquiry (T 5/8/02 p 5). Referee Leigh indicated that a blood test would not be determinative on the issue (T 5/8/02 p 5).

On July 3, 2002, the assistant prosecuting attorney filed a motion to amend the petition. Pursuant to the motion, the first amended petitions now listed only one man's name under the section of the petition where the father's name appeared. For Kiara, Mr. Herron was listed. For Kejuan, Mr. Jefferson was listed. For Keangelo and Kemaria, Mr. LaGrone was listed. The motion was filed in anticipation of the July 8, 2002 trial date.

On July 8, 2002, all of the relevant parties were present in front of Referee Leigh. Richard and Tina Jefferson were both present. Mr. Jefferson testified that he and Tina Jefferson were married May 24, 1988 in Toledo, Ohio (T 7/8/02 p 4). They were still married. After that testimony, Referee Leigh indicated that there was no reason for Mr. Herron or Mr. LaGrone to be involved in the proceedings as Mr. Jefferson was the legal father (T 7/8/02 p 7). Mrs. Jefferson then testified. According to Mrs. Jefferson, her husband had been in and out of prison during the time that her children were conceived (T 7/8/02 p 10). She went on to testify that Larry LaGrone was the biological father of Kemaria, Keangelo, and Kejuan; Frederick Herron was the biological father of Kiara (T 7/8/02 p 10).

After the testimony of Mr. and Mrs. Jefferson, Referee Leigh was presented DNA evidence that Larry LaGrone was in fact the biological father of the three aforementioned children.

> Okay. Well, at this point in time, the Court does find that the biological father of the last three kids is Mr. LaGrone but that does not give him any legal standing, and I'm not going to make a determination in regards to anything in regards to legal standing on today's date and time based on the fact that I was just handed the Girard case, which is Michigan 437 at 231, and it's spelled G-I-R-A-R-D, and I'm not able to adequately read it through to see if there's any difference between this particular case that I have before me and the case at hand (T 7/8/02 p 11).

Following the referee's remarks, Mr. Jefferson's attorney responded as follows:

> Your honor, I would indicate to the Court after speaking to my client - and obviously, my client's position is that he is not the biological father of any of these children. He has indicated to me he does not wish to partake in these proceedings, he does not wish to be here, he would like to be taken back so that he can continue his educational path that he's on at his current institution. He does not want to be here for the trial date (T 7/8/02 p 13).

Referee Leigh responded as follows, "I'm not making a determination at this point in time, and based on the information I have, he's the legal father" (T 7/8/02 p 13). Referee Leigh went on to indicate that Judge Joan Young would decide the matter on July 26, 2002.

On July 26, 2002, the attorneys appeared in front of Judge Young on a motion hearing, pursuant to Mr. LaGrone's motion for a "determination of the legal father" (T 7/26/02 p 6). Judge Young asked the parties to review *McHone v Sosnowski*, 239 Mich App 674; 609 NW2d 844 (2000), before she would listen to arguments from counsel (T 7/26/02 p 9). Mr. Otlewski argued that *McHone* should not apply to his client because the juvenile court rules are "broader" than the Child Custody Act or the Paternity Act (T 7/26/02 p 11). Judge Young listened to that argument and then asked the attorneys about the effect of such an interpretation. Specifically, Judge Young voiced her concern over the putative father who was unsuccessful in other forums at disproving the presumption of legitimacy now being tempted to file a complaint with the Family Independence Agency, in the hope that if an action were opened in the abuse/neglect arena, that same otherwise precluded individual could create for himself an opportunity not otherwise afforded to him (T 7/26/02 p 21). Counsel for Mrs. Jefferson repeatedly argued that the appropriate focus was the legal father (T 7/26/02 p 23). Unless and until the court found that there was no legal father, counsel argued that the court should disregard any requests made by the putative fathers (T 7/26/02 p 23).

The Guardian Ad Litem raised concerns over other implications of such an approach. The GAL questioned where the scenario involved temporary jurisdiction and a legal father who was trying to work with the system to raise his children (T 7/26/02 p38). Such an approach would allow a putative father to intervene and "upset the apple cart" of the established relationship between a legal father and his children. *Id.* Judge Young requested briefs on the issue from the parties by August 9, 2002 before she would issue a ruling on the issue.

On September 9, 2002, Judge Young entered an order granting Mr. LaGrone's motion. The following language appears in that order:

> The court is troubled by the holding in *Montgomery, supra* [185 Mich App 341; 460 NW2d 610 (1990)]. The *Montgomery* case holds that a putative father who does not have standing in a paternity action has standing in a neglect proceeding provided the court determines he is the biological father. In this court's opinion *Montgomery, infra* creates an inconsistency with the line of cases decided under the Paternity Act. A putative father should have no better position in a neglect proceeding than he enjoys where no neglect proceeding exists.
>
> However, this court is bound by the controlling case law. Thus, this court finds that despite the lawful marriage of Respondent Tina Jefferson to Respondent Richard Jefferson, based on the arguments of the parties, Larry LaGrone is the biological father of the minor children and therefore, he has standing to bring a motion for a determination of paternity under *Montgomery, supra.*
>
> Respondent Larry LaGrone's motion to determine that he is the legal father of Keangelo LaGrone, KeMaria LaGrone, and KeJuan Jefferson is granted.

This Court held the application for leave to appeal that order in abeyance pending the decision in *In re CAW* (Docket No. 122790). The application was subsequently granted and limited to the specific questions listed previously.

ARGUMENTS

I. Does a putative father have standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father?

The argument proffered by counsel for Mr. LaGrone is that a putative father has standing to request a judicial determination of paternity where there is already a legal father as the Juvenile Code provides putative fathers with more substantive rights than they are afforded under the Paternity Act or the Child Custody Act. Such a position is actually contrary to the court rules governing child protective proceedings, as well as the established case law.

Pursuant to MCR 5.903 (A)(4)(a), "father" means a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock. MCR 5.903(A)(1) defines "child born out of wedlock" as "a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage. [Although the Juvenile Court rules beginning at 5.900 *et seq* have been repealed and now begin at 3.900, this question is being analyzed using the court rules that were in effect at the time of The trial court's decision.]

The most important language contained in the court rule is the presumption that the husband is the legal father of any child born or conceived during the marriage. This language mirrors that found in the Child Custody Act and Paternity Act. In *Michael H v Gerald D*, 491 US 110, 109 S.Ct. 2333, 105 LEd 2d 91 (1989), the United States Supreme Court upheld a California statue that contained language similar to the Michigan statutes. In *Michael H*, the Supreme Court considered a situation where a child was conceived during a marriage and the wife cooperated with the putative father to obtain a blood test that established a 98% likelihood that the putative father was the biological father. The Supreme Court upheld the California

court's decision to refuse the putative father the ability to establish a legally recognizable relationship to the child. In doing so, the Supreme Court stated that "California law, like nature itself, makes no provision for dual fatherhood. " *Id.* at 118. The Supreme Court went onto to state that if a putative father were successful in invading the presumption of legitimacy afforded to children born to a married couple, then the negative effects of such a decision would be meted out upon the marital father. *Id.* at 130. Such a policy would allow a man to invade an established family unit based upon a biological link, without regard to the child or what is in the child's best interests. The Supreme Court extended the analysis to point out that decisions regarding a child's care, activities, education, and health could be extended to a rapist. *Id.* at 118, 124.

This Court followed the Supreme Court's analysis when presented with a similar issue in *Girard v Wagonmaker,* 437 Mich 231; 470 NW2d 372 (1991). This Court discussed at length the plain language and legislative intent in the Paternity Act and Child Custody Act before finding that neither of these statutes afforded a putative father standing to establish a legally recognizable relationship to a child that is the issue of the marriage. This Court held unequivocally that a putative father was precluded from establishing a relationship to the child until a prior judicial determination was made that the child was not the issue of the marriage.

Our society values marriage and maintaining family values. As this Court held back in 1919 in *Kotzke v Kotzke's Estate,* 205 Mich 184, 189; 171 NW 442, the presumption of legitimacy to children born in a lawful wedlock is one of the strongest known to the law. The protected interest lies with the husband. Based upon the facts articulated in *Michael H,* the United States Supreme Court found that even when the wife cooperated with the putative father to obtain a blood test, the husband/presumptive legal father could still chose to maintain his relationship to his child and prevent the biological father from invading the family unit. The

presumption of legitimacy is high and can only be rebutted by clear and convincing evidence. That clear and convincing evidence is not only a blood test. Unless and until the husband were to come forward and agree that the child is not the issue of the marriage, that he does not wish to maintain a relationship with the child, and that such a relationship is not in the child's best interests, the child will maintain the protections afforded to legitimate children regardless of biology.

The progeny of *Girard* at the appellate level has examined this issue repeatedly. In *Hauser v Reilly*, 212 Mich App 184, 189; 536 NW2d 865 (1995), the Court of Appeals refused to confer standing on a putative father for a child that was by definition the issue of the marriage reiterating that the protected interest is family life, not the mere biological link. Most recently, in *Aichele v Hodge*, COA No. 247021, released October 21, 2003, the Court of Appeals refused to confer standing on a putative father who sought visitation and child support for a child that was the issue of a marriage. In *Aichele*, the putative father had a paternity test that indicated a 99.99% likelihood that he was the biological father to the child. The husband and wife were raising the child along with their other children as a family unit. The Court of Appeals found that even where the putative father stated that the wife had at some point in time allowed him a relationship with the child, the court refused to make the determination that the child was born "out of wedlock" where the husband was raising the child as his own. The Court of Appeals found that such a holding would circumvent established legal processes and permit "the mother of a child born out of wedlock and the putative father to collude and essentially rob the presumed father of his parental rights and his child. This is particularly egregious as a married father would be stripped of his parental rights without notice or hearing."

Where there is a child born or conceived during a marriage, a presumption of legitimacy attaches. As another of the progeny of *Girard* held, such a presumption cannot be disputed after

the death of the parent. *In re Quintero*, 224 Mich App 682; 569 NW2d 889 (1997), was decided under the Probate Code and involved rights of interstate succession. Obviously, those rights too are involved when the presumption of legitimacy is at issue. Regardless of the factual scenario, the societal interests being protected are the same: the family unit, not the biological link. To allow a husband to afford his child the mantle of legitimacy serves a societal function.

Where a husband is not the biological father of the child, does not wish to have a parental relationship with the child, and allowing such a denial is in the child's best interests, the court has the ability to find that the child is not the issue of the marriage. The most common forum for such a determination is within the context of a divorce proceeding. All parties agree that after a court has made a finding that the child is not the issue of the marriage, then a putative father can establish a relationship to the child in a legally recognized manner because *the child will be without a father.*

The Juvenile Court rules mirror the language in the Paternity Act; they do not expand a putative father's rights. As the trial court properly voiced on the record, if that were the case, clever putative fathers would file complaints with the Family Independence Agency in an effort to create a controversy where they could then confer standing on themselves. Such an outcome would allow putative fathers to thwart the law. Furthermore, as the Guardian Ad Litem also hypothesized, such an interpretation could potentially destroy families where the husband is trying to keep all of his children together. For the child who might not be the husband's biological offspring, but had spent a lifetime in his care, such an interpretation would have a destructive effect. The juvenile court rules do not confer substantive rights on putative fathers under MCR 5.903 or 5.921 [now MCR 3.903 or 3.921]. As stated previously, under MCR 5.903 [now MCR 3.903], the presumption of legitimacy exists until a judicial determination that the children are not the issue of the marriage. Under 5.921, putative fathers are afforded notice of

child protective proceedings: "(i)f at any time during the pendency of a proceeding *the court determines that the minor has no father as defined in 5.903(A)(4),* the court may, in its discretion, take appropriate action in this subrule."

The effect of the language in both court rules is clear. A court must make a determination that the minor has no father *before* a putative father is entitled to notice or to take steps to establish paternity. This is not the creation of greater substantive rights.

In this particular case, such a determination could have been made. Examining the record below, however, that determination was never made. On July 8, 2002, both Mr. and Mrs. Jefferson were in court. Despite the continuous marriage since 1988, Mrs. Jefferson said that Mr. Jefferson was not the father of the children (T 7/8/02 p 10). Through counsel, Mr. Jefferson also stated that he was not the father *and he* did not wish to plan for the children (T 7/8/02 p 13). At the time, given the parties' statements, the court should have made a determination regarding whether the children were the issue of the marriage. Instead of discussing Mr. LaGrone's blood test, the court should have been looking for clear and convincing evidence regarding the marital offspring. Once Mr. And Mrs. Jefferson stated that the children were not Mr. Jefferson's biological children and that he did not want to be involved with the children, the court should have been making the finding, based upon clear and convincing evidence, disestablishing Mr. Jefferson's paternity. The court had clear and convincing evidence to rebut the presumption, the judicial determination could have and should have been made.

If that had occurred, the putative father could then have stepped forward and established a legal relationship with the children by completing an Acknowledgment of Parentage form along with the mother because the children *would have had no father.* See, MCL 722.1001 Acknowledgment of Parentage Act. Such a process is consistent with the Paternity Act and the Child Custody Act.

II. In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children?

Based upon the analysis in question I, the answer to this question is very brief. The court's finding regarding Mr. LaGrone as the biological father had no legal significance. The preliminary finding regarding whether the children were the issue of the marriage was not made. Therefore, any findings regarding biology were without impact.

In this case, if Mr. Jefferson had come to court and stated that, regardless of the biological relationship, he regarded all of these children as his own and that he wanted to plan for all of them, then that would have been the end of this case. The children would have had a legal father and the putative fathers would have been without recourse. As stated previously, putative fathers only have standing in the Juvenile Court Child Protective Proceedings where there is no legal father. Regardless of the blood test results, the children would already have a father. As the United States Supreme Court accurately stated in *Michael H, supra,* nature allows for one father.

This Court followed that analysis in *Girard* and its progeny. Rapists and sperm donors can be biological parents. Taking Mr. LaGrone's analysis at face value and to its natural extension, these individuals would be able to come forward and invade the family unit if they had the right blood test. The intent of the Legislature was never thus. The Court of Appeals has repeatedly rejected such an argument. See, *Hauser v Reilly, supra. Aichele v Hodge, supra. McHone v Sosnowski, supra. Spielmaker v Lee*, 205 Mich App 51; 517 NW 2d 558 (1994).

The trial court's finding regarding Mr. LaGrone as the biological father was premature. Until the court made the finding regarding whether the children were the issue of the marriage, such an order should not have been entered. The Trial Court's order to confer standing on Mr.

LaGrone, and thereby allow him to bring an action for determination of paternity, should be reversed and remanded.

III. Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act?

The juvenile court rules do not confer greater standing than is provided under the Paternity Act. The trial court properly indicated on the record at the motion hearing, to give the court rules such a construction would encourage clever fathers to use the Family Independence Agency as a way of conferring standing upon themselves. Counsel for Mr. LaGrone argued that the court rules, "are broader" (T 7/26/02 p 11). The trial court was careful to bring to the attention of the parties that provisions regarding notice are not provisions creating standing.

Under the juvenile court rules, the mother's husband is presumptively the father unless the court has determined that the child was born out of wedlock. Under the Paternity Act, "child born out of wedlock" is defined as "a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." Under both the Paternity Act and the juvenile court rules, marriage at conception or birth confers legitimacy upon the child and creates the parental interest in the mother's husband. The definitions are consistent and reflective of the societal value of protecting the family unit.

In the juvenile court rules, putative fathers are mentioned in the rules governing definitions and notice. See MCR 5.903 and 5.921(D) [now 3.903 and 3.921). However, at the beginning of both of those rules is language either establishing the husband as the presumptive legal father or requiring that putative fathers only receive notice in the absence of a legal father. In the absence of a legal father, the juvenile court rules provide that a putative father can come forward and establish a legally recognized relationship to their biological offspring. See, MCR

5.921(D)(2) [now MCR 3.921(C)(2)(b)]. Once that legally recognized method has been used, the putative father becomes a legal father and can become invested in the planning for his child. Until the putative father does that, he has no rights to the child. Although the Agency routinely terminates the parental rights of the putative father where there is no legal father in order to bring permanency to child who is a court ward, the Court of Appeals is split on whether even that should be done. *See, In re SG, TG, DG and QR,* Unpublished COA No. 227520, issued March 6, 2001 (Appendix 1) as compared to *In re Quinn*, Unpublished COA No. 243510, issued July 22, 2003 (Appendix 2).

There is no provision in the juvenile court rules to provide for dual fatherhood. Mr. LaGrone's motion before the trial court to establish his relationship to the children, without regard to their relationship to their legal father, sought a relief not provided under the juvenile court rules. There is no court rule that empowers a man with a DNA test to take precedence over a legal father.

IV. Given that MCR 3.921(C)(2)(b) [formerly, MCR 5.921(D)(2)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act?

Beginning with the language at MCR 3.921(C)(2), this provision can only be invoked when "the court determines that the minor has no father as defined in MCR 3.903(A)(7)." If the court has made that preliminary determination, then the court may conduct a hearing and determine that the putative father is the natural father "and justice requires that he be allowed 14 days to establish his relationship according to MCR 3.903(A)(7)." When there is no father, the finding that the putative father is the natural father *only allows him to establish his relationship.* Pursuant to MCR 3.903(A)(7), that can be done in a number of ways: by order of filiation [MCR

3.903(A)(7)(c)]; by judgment of paternity [MCR 3.903(A)(7)(c)]; and by Acknowledgment of Parentage, filed in compliance with MCL 722.1001, *et seq* [MCR 3.903(A)(7)(e)].

In order to be regarded as a father under MCR 3.903, the putative father will have to take volitional steps to establish his relationship to the child in accordance with firmly established methods. Despite the attempts to make the juvenile court rules appear inconsistent or "broader," they are simply functioning to do what court rules are intended to do: provide guidelines for practice and procedure. If a putative father wants to establish a relationship to his child, MCR 3.903 tells him how to do that. The methods are listed; however, that is not a creation ore expansion of substantive rights.

MCR 3.921 directs putative fathers to MCR 3.903 to establish paternity within 14 days of the court's finding that a putative father is the natural father. MCR 3.903(A)(7)(e) instructs putative fathers to file an Acknowledgment of Parentage in compliance with the Paternity Act. There is no authority provided under MCR 3.921 that allows the court to make a finding of legal status and circumvent MCR 3.903. In the case at bar, the trial court's order did not create legal rights in Mr. LaGrone, but rather directed Mr. LaGrone to take steps to establish that relationship in a legally recognized manner. Again, this order pursuant to MCR 3.921 was premature, as the foundational requirement of MCR 3.921(C) [a finding that the child had no father] was never met.

V. Does *In re CAW* apply to this case?

In re CAW, supra, applies to this case. At the motion hearing on July 26, 2002, in front of Judge Young, the judge posed the question to counsel whether termination of the husband's legal rights would constitute a finding that the child was not the issue of the marriage and allow the putative father to stand in the legal father's shoes. That same analysis was proposed by the Court of Appeals in *CAW.* This Court reversed the Court of Appeals when it made such a

finding. This Court held that a termination of parental rights is the termination of the legal father's ability to plan for the child and has no effect on whether the child is regarded as the issue of the marriage.

CONCLUSION AND RELIEF SOUGHT

Wherefore, the Attorney General respectfully requests that this Honorable Court analyze the facts of this case in the same manner that it did *CAW*. The trial court's order should be reversed and the matter should be remanded for the entry of proper findings regarding the marriage and whether the children are the issue of the marriage prior to any ruling on the putative father's right to establish paternity.

Respectfully submitted,

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Dated: November 6, 2003
Hanksd/atty/mcmurtry/amicus brief

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SG. TG DG and QR, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SUSAN GRAHAM,

Respondent-Appellant,

and

CHARLES RIGG,

Respondent-Appellant,

and

JACK GRAHAM,

Appellant.

UNPUBLISHED
March 6, 2001

No. 227520
Ingham Circuit Court
Family Division
LC No. 00-004693-NA

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Respondents Susan Graham and Charles Rigg appeal as of right from the family court's order terminating their parental rights pursuant to MCL 712A19b(3)(c)(i), (g) and (j); MSA 27.3178(598.19b)(3)(c)(i), (g) and (j). We affirm as to Susan Graham but vacate as to Charles Rigg for the reason that Mr. Rigg lacks standing to assert any legal rights as to any of the minor children at issue herein.

I. Basic Facts and Procedural History

This case has a lengthy factual history spanning over a two and a half year period. Susan Graham (hereinafter referred to as "Respondent Graham") has four minor children. All four

children have different fathers. Respondent Graham claims and Charles Rigg (hereinafter "Respondent Rigg") affirms that he is QR's biological father[1]. On May 2, 1997, a Petition alleging abuse and neglect was filed against Respondent Graham. The initial petition also named Respondent Graham's former husband Jack Graham along with Charles Rigg; QR's "putative father."[2] On May 30, 1997, a juvenile court officer filed a motion to review custody as regards the four minor children. Finding that the children's well being was substantially at risk, the referee placed the children with the Michigan Family Independence Agency (hereinafter "FIA") for out-of-home placement. On June 10, 1997, the court held a hearing and affirmed the referee's decision. After Respondent Graham entered a plea, the court took jurisdiction over the children on July 15, 1997.

The record reflects a sustained effort on the part of the FIA to reunify this family over a two and half year period. By April 13, 1999, all of the children were placed back in Respondents' home. However, in the fall of the same year, the children were once again removed because of Respondents' chronic failure to consistently comply with all applicable court orders.

After conducting a three day hearing, the family court found that the conditions culminating in adjudication continued to exist. Accordingly, the family court terminated Respondent Graham's parental rights to all four children. The family court recognized that Respondent Rigg did nothing to establish his status as QR's legal custodian, but notwithstanding, noted that he participated in the services provided by FIA and also appeared at the termination hearing. Accordingly, the family court held that it was in the children's best interest to terminate Respondent Riggs' parental rights. The family court further held that it was in QR's best interest to terminate Respondent Rigg's parental rights as QR's "putitive father."

II. Standard of Review

Decisions to terminate parental rights are reviewed for clear error. *In re Sours*, 459 Mich 624; 593 NW2d 520 (1999).

A. Respondent Graham

After carefully reviewing the record, this court is satisfied that the family court did not clearly err in finding that the provisions delineated in MCL 712A.19b(3)(c)(i), (g) and (j) were established by clear and convincing evidence, to wit, 182 or more days have elapsed since the initial dispositional order, and after two and a half years of FIA's sustained efforts to reunify this family, respondent is not any closer to that goal than she was when the FIA filed the initial dispositional order. At one point, the children were placed back with respondent only to be

[1] Although Respondent Graham and Respondent Rigg both claim that Respondent Rigg is QR's biological father, Respondents did not proffer any evidence at the termination hearing definitively establishing the biological connection.

[2] The initial petition also named "Scott" as a putative father. The fourth father was not identified. Respondent Rigg is the only "putative father" that appeared at both the initial hearing in May, 1997 and the termination hearing in April, 2000.

removed from her care a second time. Respondent's failure to consistently comply with all applicable court orders for the preceding two and a half years strongly suggests that respondent will not be able to do so within a reasonable time considering the children's age. Moreover, the record indicates that if the children are returned to respondent's home again, there is a reasonable likelihood that the children would be harmed. Accordingly, with regard to respondent Graham, this court affirms the family court's findings and disposition in all respects.

B. Respondent Rigg

The parties did not raise an issue concerning Respondent Rigg's standing to appeal the family court's determination due to Respondent Rigg's failure to obtain documentary evidence establishing his paternity. Although all parties seem to accept that Respondent Rigg is QR's "putative father," the fact remains that the lower court record is devoid of evidence definitively establishing same. Because this is an important issue, we deem it necessary to raise, *sua sponte*, whether Respondent Rigg has standing to appeal the family court's decision. We hold that he does not. We therefore vacate that part of the family court's decision insofar as it pertains to Respondent Rigg for the reasons discussed herein.

1. Respondent Rigg's Standing

The Juvenile Code defines the term "father" at MCR 5.903(A)(4)(a) as "a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock." The term "child born out of wedlock" is a term of art defined in the current version of the Paternity Act as:

> "[a] child begotten and born to a woman who was not married from the conception to the date of birth of the child, or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a).

In the case at bar, the record is unequivocal. Although Respondent Rigg and Respondent Graham both acknowledge that Respondent Rigg is QR's biological father, it is undisputed that at the time of QR's birth, Respondent Graham was married to Jack Graham. Respondent Rigg testified that he was not permitted to sign an Acknowledgment of Paternity because Respondent Graham was still married. Respondent Rigg further testified that even after a court held a hearing and annulled the marriage between Respondent Graham and Jack Graham, Respondent Rigg failed to follow the necessary steps to definitively establish paternity. Absent an adjudication by a court of competent jurisdiction finding that QR was a "[c]hild . . .born or conceived during a marriage but not the issue of that marriage," for purposes of the Paternity Act, Respondent Rigg, as the purported biological father, lacked the requisite standing to establish his paternity[3].

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[3] See *McHone v Sosnowski*, 239 Mich App 674; 609 NW2d 844 (2000)(holding that the biological father did not have standing to pursue an Order of Filiation when there was no prior judicial determination that the child was not the issue of the marriage).

The family court recognized that Respondent Rigg was not QR's legal father by virtue of Respondent Graham's marriage to another man at the time of QR's birth. Notwithstanding, the family court referred to Respondent Rigg as QR's "putative father." In that capacity, the family court proceeded to determine whether it was in QR's best interest to terminate Respondent Rigg's rights as the "putative father."[4] Since Respondent Graham's marriage to Jack Graham provided QR with a legal "father" as defined in MCR 5.903(A)(4), Respondent Rigg cannot be QR's "putative father." A "putative father" cannot coexist with a legal father irrespective of any biological connection between the "putative father" and the minor child. *McHone v Sosnowski*, 239 Mich App 674; 609 NW2d 844 (2000).

For purposes of the termination proceedings therefore, Jack Graham is presumed to be QR's legal father. Accordingly, as the legal father, only Jack Graham would have the requisite standing to appeal the family court's findings. Respondent Rigg does not. Since Respondent Rigg lacks standing to establish paternity, Respondent Rigg lacks standing to appeal the family court's determination that it is in QR's best interest to terminate his parental rights. However, even if Respondent Rigg established paternity and had standing to appeal the family court's decision as to QR, there was ample evidence placed on the record to support the family court's decision that it was not in the children's best interest to continue with reunification efforts and terminate Respondents' parental rights. Despite two and a half years of substantial agency service, the record reveals that Respondents failed to make any significant changes in virtually all areas of concern.

II. Conclusion

Decision affirmed as to Respondent Graham but vacated as to Respondent Rigg for the reasons discussed herein.

/s/ Jane E. Markey
/s/ Gary R.. McDonald
/s/ Kirsten Frank Kelly

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[4] During the termination hearing, the Court specifically addressed Appellant Rigg's legal status with regard to QR. The court stated, "[t]he Court does recognize that . . .Mr. Rigg has not stepped forward, though he has testified today that he was the father of [QR], he has not stepped forward to sign an Affidavit of Paternity. His is not the legal father of [QR]. He's the putative father with testimony that he believes he is the father. [T]he Court is certainly aware of how he is viewed by the law as it relates to [QR]and . . .will keep that in mind in determining whether or not, as a putative father, his rights should be terminated in [QR]."

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of WESLEY VAUGHN QUINN,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JOSEPH J. QUINN III,

Respondent-Appellant.

UNPUBLISHED
July 22, 2003

No. 243510
Oakland Circuit Court
Family Division
LC No. 99-625268-NA

Before: Zahra, P.J., and Talbot and Owens, JJ.

MEMORANDUM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(g). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Respondent signed a parent agency agreement in 1999 and failed to make progress on it for three years. Respondent was the minor child's putative father because the mother was legally married to another man at the time of the child's birth. Respondent had signed an affidavit of parentage in Indiana shortly after the minor child's birth there, held himself out as the child's father, indicated a desire to plan for the child, and was, thus, offered services from 1999 to 2002. The trial court terminated the legal father's parental rights in February 2002 and then named respondent in a petition for termination.

Respondent failed to provide proper care or custody of the minor child, and while not legally obligated to do until the legal father's parental rights were terminated, respondent was legally obligated to comply with the court ordered parent agency agreement in preparation to care for the child. MCR 5.973(A); *In re Macomber*, 436 Mich 386, 389-391; 461 NW2d 671 (1990). He failed to do so. Thus, the trial court did not clearly err in finding that the statutory ground for termination was established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, the trial court did not err in finding that termination of respondent's parental rights was not clearly against the minor child's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

We next address respondent's argument that the trial court abused its discretion in refusing to order that his psychological evaluation take place in Indiana, where he was incarcerated, and in refusing to order a psychological evaluation of the minor child prior to making a best interests determination. Whether to order a psychological evaluation is within the trial court's discretion. MCR 5.923(B); *In re Bell*, 138 Mich App 184, 187-188; 360 NW2d 868 (1984).

In this case, the trial court had previously adjourned the best interests hearing to schedule a psychological evaluation to accommodate respondent's anticipated release date, but respondent was not released. Further adjournment would have only delayed permanence for the minor child. The trial court did not abuse its discretion in refusing to order the psychological evaluation to take place in Indiana or in refusing to adjourn the best interests hearing a second time.

Furthermore, the evidence established that the minor child exhibited anxiety for fear of being taken from his foster home and returned to respondent and not because he missed respondent. A psychological evaluation of the minor child was not necessary to determine this, and the trial court did not abuse its discretion in refusing to order one. *Bell, supra* at 187-188.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
H.W. Saad, H.R. Gage, and J.R. Cooper

In the Matter of K.H., K.L., K.L., and K.J.

Supreme Court No. 122666
Court of Appeals No. 244028
Circuit Court No. 98-613188-NA

Minors. /

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STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

PROOF OF SERVICE

Diana Hanks, being duly sworn, deposes and says that on the 6th day of November, 2003, she served a copy of the Amicus Curae Brief for The Michigan Attorney General's Office, upon counsel of record by depositing the same in the United States mail depository in the Wayne County Circuit Court, Family Division, located at 1025 E. Forest in Detroit, Michigan, enclosed in an envelope bearing postage fully prepaid, addressed as follows, enclosed in an envelope bearing postage fully prepaid

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Subscribed and sworn to before me
This 6th day of November, 2003:

BETTY S. SHEPARD, Notary Public
Wayne County, Michigan
My Commission Expires: January 7, 2006